

In the Matter of Arbitration Between

Teamsters Local 320	)	BMS Case No. : 12-PA-0114
	)	Issue: Contract
	)	Hearing Site: Minneapolis
“Union”	)	Hearing Dates: 02-16, 17-2012;
	)	and 03-07-2012
)	
and	)	Brief Submission Date: 04-09-12
)	
	)	Award Date: 06-09-2012
)	
The University of Minnesota	)	Harry S. Crump
	)	Labor Arbitrator
“Employer” or “University”)	
	)	BMS Case No. 12PA0114
)	

JURISDICTION OF ARBITRATOR

Pursuant to Article VIII, Grievance Procedure, Section 8.4, Procedure, Step 4 of the 2009-2011 Collective Bargaining Agreement (“CBA”) (Employer Exhibit #1 and Union Joint Exhibit) between the University of Minnesota (hereinafter referred to as the “Employer” or “University”) and Teamsters Local 320 (hereinafter referred to as “Union”) provides for an appeal to arbitration of disputes that are properly processed through the grievance procedure. The Employer and Union (collectively referred to as the “Parties”) agreed that this matter is properly before the arbitrator for a “final and binding” determination. The Hon. Harry S. Crump was selected as the arbitrator. Further, the parties waived the 30-day decision period referenced in Article VIII, Section 8.5 B in the CBA.

The Hearing was held February 16, 2012, February 17, 2012, and March 07, 2012 at the University of Minnesota McNamara Alumni Center. Both parties have had an opportunity to present evidence in support of their respective positions; witnesses’ testimony was sworn and cross-examined; and joint (“CBA and “MOU”) and parties exhibits were introduced into the record.

Post-Hearing briefs were timely filed by postmark and e-mail as of April 9, 2012 and the record was closed as of the same date. On that date, the case record was taken under advisement by the Arbitrator.

APPEARANCES

For the Union:

Patrick J. Kelly

Sue Mauren

David Minke

Attorney-at-Laws

Principal Officer, Secretary-Treasurer

Union Steward

Curtis Swenson
Bill Kuobel
Joseph Warhol
Julie Harrington

Business Agent

Union Stewart
B&G Worker and Steward

For the Employer:

Shelley Carthen Watson
Ann Durushia
Robert Amos
Sam Talbert
Mike Berthelsen

Associate General Counsel
University Services Human Resources
Paralegal General Counsel's Office
Facilities Management, District Director
Facilities Management, Associate Vice-
President

Sheri Stone

Director of Employee Relations,
Office of Human Resources

Ronald Mapston

Facilities Management, Associate
Director, HS District

Thomas McArdle

Custodial Supervisor, Facilities
Management, East Bank District Jeffery

W. Schmidt

Operational & Senior B&G Supervisor,
Facilities Management, East Bank
District

I. BACKGROUND AND FACTS

Facilities Management ("FM") is a department of University Services, responsible for the physical assets of the University to ensure a quality environment for students, faculty, staff and visitors in support of the University's mission of teaching, research and outreach. FM is organized into three Zones or Districts to serve the Twin Cities campus of the University. They are East Bank District; Health Sciences District; and St. Paul District/West Bank District. Custodial operations are performed by employees in the Teamsters bargaining unit, as well as many different trades people assigned to the University as day laborers.

Minnesota Teamsters Public Law Enforcement Union, Local Number 320, (hereinafter referred to as "Union") has represented University Employees since 1973. A key component of the represented group is the Building and Grounds ("B&G") Employees in Facilities Management. At the present time, there are approximately 431 employees in B&G. The responsibilities of B&G employees include maintenance of grounds, custodial services and special projects.

In 2001 the parties engaged in negotiation for a new contract. As a result of the negotiations, the parties entered into and signed the Memorandum of Understanding (the "MOU") that was integrated into the CBA and became effective in 2001. The MOU continues effective through the present CBA

(effective dates of June 8, 2009 through June 30, 2011.) The MOU required B&G Workers to bid into defined areas within the First Level Supervisors Areas.

Prior to commencement of the negotiation in 2001, Joe Kelly, the assistant Director of Employee Relations for the University, notified the Union that the University was ending all past practices regarding custodial bidding in FM, and that the University would no longer recognize any practice not specifically outlined in the contract.

In November of 2010, FM informed the Union that FM was thinking of moving to Team Cleaning. The implementation of Team Cleaning necessitated a rebid of the entire campus, which occurred in June of 2011. The bid process was the same as it had been in 2009, with B&G Workers each bidding into a defined area within a first level supervisor's area. The only difference was instead of the majority of B&G Workers being the only person bidding into a defined area; the defined areas were larger, with multiple B&G workers bidding into the areas. The Union filed this grievance on June 08, 2011, for Contract Articles Violations, i.e., Memorandum of Understanding B&G Bidding in FM, past practice, all other related Articles, and pertinent information. The remedy requested was cease and desist the bidding and follow the current MOU in the Labor Agreement by bidding defined areas within the First Level Supervisors Area.

II. Employer Position

The Employer states that the CBA is silent as to how work assignments for FM B&G Workers will be done. As a result, by 1992, a system had evolved whereby FM B&G Workers could bid into a defined area, which could be a particular building, floor or floors in a building, or a zone. (Durushia, Talbert, Schmidt Testimony.) When a vacancy occurred, FM B&G Workers in that first level supervisor's area could bid for the position, which would be filled by master seniority. (Durushia Testimony, Employer Exs. 14, 15.) If the vacancy was not filled, the vacancy would be posted in the zone and filled by master seniority. *Id.* If the position remained vacant, the position would be posted campus wide. *Id.*

In 2001, the parties engaged in negotiations for a new contract. (Mauren, Talbert Testimony.) Prior to commencement of the negotiations, Joe Kelly, the Assistant Director of Employee Relations for the University, notified the Union that the University was ending all past practices regarding custodial bidding in FM, and that the University would no longer recognize any practice not specifically outlined in the contract. (Mauren Testimony; Employer Ex. 29.) During negotiations, there were no proposals or discussions across the table regarding the assignment of work or work locations for FM B&G Workers. (Mauren, Minke, Talbert Testimony.) The parties did agree to a Memorandum of Understanding ("MOU") to govern the filling of vacancies.

(Durushia, Mauren, Talbert Testimony; Employer Ex. 16.) The MOU, which was intended to govern bids on vacancies, changed the bid process in two ways: eliminating the step of zone bidding, and permitting the addition of floaters of up to twenty percent (20%) in each zone. *Id.* While the MOU still requires the B&G Worker to bid into one defined area, it does not address how many B&G Workers can bid into a defined area, nor does it address how work or tasks in that defined area are to be assigned or completed. *Id.*

The Employer further states that in fiscal year 2008-2009, the University faced a **financial crisis of epic proportions**. The economy in general was struggling, the University had received an unallotment by the Minnesota Legislature, its base level appropriation from the Legislature had been cut, and we were anticipating a further reduction from the Legislature. In response, the University implemented cost reductions and resource adjustments, and FM was forced to significantly reduce its Operations and Maintenance budget as well. (Berthelsen Testimony.) FM had begun the year with five hundred and twenty-two (522) custodial positions; budget constraints would force FM to pare its custodial positions down to four hundred and fifty nine (459). *Id.* In order to minimize layoffs, FM instituted a hiring pause, did not replace employees as people left, offered the Retirement Incentive Offer ("RIO") program, and provided a voluntary severance program. *Id.* Taken together, these actions saved FM from laying off forty (40) custodians. *Id.* In order to reach its budget, however, FM still needed to reduce twenty-three (23) more custodial positions. *Id.* With fewer custodians, work areas became larger, and FM instituted a number of efficiency initiatives, resulting in new cleaning areas and the need to re-bid the entire campus.

To assist in this endeavor the FM Labor Management Committee ("LMC"), reconvened on February 18, 2009 after an approximate three-year hiatus. One of the issues the LMC dealt with was helping to create a fair plan to transition from FM's current work area assignments to the new work area assignments, including re-bidding the campus. The LMC meeting held on February 18, 2009 was attended by the following individuals:

- Ann Durushia, University Services Human Resources,
- Julie Harrington, B & G Worker and Steward,
- Jerry Busse, Senior B & G Supervisor
- Sue Mauren, Secretary Treasurer, Local 320
- Thomas McArdle, Senior B & G Supervisor
- Shannon Mitchell, Facilities Supervisor
- Thomas Perkins, Business Agent, Local 320

- Marshall Skule, Zone Manager
- Brian Utesch, B & G Worker and Steward
- Joe Warhol, B & G Worker and Steward

(Durushia Testimony; Employer Ex. 13, p. 18.) The LMC subsequently met on March 18, and again on May 6, 2009. *Durushia Testimony; University Ex. 13, pp .6, 7.* Each of the individuals above was present, as well as Union business agent, Curt Swenson. *Id.* At the conclusion of the May 6 meeting, the Union made the following proposals with respect to the re-bidding process:

- Bid campus-wide using Master Seniority.
- Provide an up-to-date seniority roster.
- Provide employees with the opportunity to visit areas which they may be interested in prior to the bid process.
- Post area assignments in each supervisor's area and on the web. Keep the list up to date throughout the bid process so employees are kept aware of what remains available to bid on.
- For those employees on vacation or out sick, provide a call in number for bidding.
- Post employee bid times by crew.
- Send letters to home addresses about bid times for those on FMLA, LOA.

(Durushia, McArdle Testimony; Employer Exs. 13, 18.) More importantly, the LMC reviewed FM's proposed bid assignments to be used in the June 2009 rebid. *Id.* No objections or suggested changes to the bid assignments were made by the Union. (Durushia Testimony.) The LMC met next on May 27, 2009, at which time the bidding options were again discussed, but only as to whether the bidding should be done by area seniority or using Master Seniority. (Durushia Testimony; Employer Ex. 13.) Ultimately the LMC, in consultation with Union leadership, recommended that rebidding of the entire Twin Cities campus be done by Master Seniority. *Id.*

On June 11, 2009, Michael Berthelsen, Associate Vice President of Facilities Management ("Berthelsen"), notified members of the FM community that the University was undergoing historic budget cuts, and as a result, FM would be reducing its Operations and Maintenance budget by \$10 million. As indicated in Berthelsen's memo:

The overall budget reduction, modified service standards and our desire to provided more similar and consistent work assignments mean all of our cleaning areas will change. This will require a rebid of the entire campus...

We have asked the Labor Management Committee to help create a fair plan to transition from our current positions to the new one. Based on the Labor Management Committee's recommendation, consultation with Union leadership, and the vote of your Union membership, re-

bidding the entire campus will be done on a Master Seniority basis....

(Employer Ex. 6.) Berthelsen's memo provided additional details regarding the rebidding process, such as where and when the bidding would happen, bidding times, how much time a person would have to bid, proxy bidding, viewing areas of interest before the re-bidding process began, etc. *Id.*

On June 15, 2009, Berthelsen sent another Memo to the FM Community, reminding them that re-bidding on custodial areas for the entire Twin Cities campus would begin June 22. (Employer Ex. 7.) In preparation for the re-bid, FM posted bid areas, a Master Seniority list, and bid time slots in the Districts. In addition, letters were mailed to custodians' homes; distributed at muster meetings; and read by supervisors to their crews. *Id.* The B & G re-bidding process commenced at 12:00 pm on Monday, June 22, 2009. Once the re-bidding process was completed, the University published a list of the new assignments. (Durushia Testimony, Ex.18.)

Unfortunately FM's budget woes did not end there. In late 2009, as FM was planning for the 2010-2011 fiscal year, it was asked to plan for a twenty percent (20%) decrease in the size of FM over the next four (4) years. (Berthelsen Testimony, Employer Ex. 8.) FM hoped that instituting a voluntary severance program and consolidating the four (4) districts into three (3) would be sufficient, but the University required a ten percent (10%) budget reduction in FM, with a \$3.1 million reduction target for the custodial function. *Id.* While FM could have accomplished this target solely through staff reductions, it would have resulted in a loss of, among other positions, sixty two (62) full time B&G Workers. *Id.* Given that the University's physical space had increased by thirteen percent (13%) over the last decade and was continually increasing,² this was simply not feasible, leaving the FM no choice but to restructure the work assignments of its B&G Workers.

The Employer further states that the decision to restructure was not done lightly, but instead was the result of a thorough analysis of the productivity, consistency of service, vacancies and cost of FM's custodial operations. To assess productivity, FM had evaluation studies done, comparing the space, capital spending, and operations of FM in comparison to its peers in other institutions. (Berthelsen, Mapston Testimony; Employer Ex. 9.) Peers at other institutions were contacted to obtain information as to number of students and custodians, square footage and cost per hour to clean, unionization, and type of cleaning. (Berthelsen Testimony, Employer Ex. 10.) The results revealed that FM was lower than peer or industry averages. *Id.* Customer service and quality of work were reviewed to determine consistency, both of which were directly impacted by space and vacancies. (Berthelsen Testimony.) At the time, there were usually thirteen percent (13%) absent at any one time, causing FM to have to send in someone unfamiliar with the particular space and routine. *Id.*

FM was equally meticulous in considering its options. Subcontracting was ruled out: in addition to being uncommon in higher education, there are security issues with research facilities; employees become scapegoats; turnover is higher, leading

to increased cost; and it would drastically change the FM culture. (Berthelsen Testimony.) The idea of increasing the area size for which B & G Workers would be responsible was considered and rejected because it would decrease service to a level FM clients would not accept, increase employee stress, and did not address the other concerns. *Id.* The need to find a better way to manage vacancies, the discovery that FM's costs were twice the industry average, and lack of other options demanded a drastic change in the way cleaning was done and the restructuring of the work assignments of FM B & G Workers. *Id.*

At the time, the majority, but not all, B & G Workers were doing zone cleaning, whereby a B&G Worker is assigned to one area, and responsible for all services: floors, dusting, restrooms, etc. (Berthelsen Testimony.) It has its disadvantages, however. It can be very physical and isolated work, people working separately require the costly duplication of equipment, you have only one set of eyes assessing the space, any vacancy requires a new person assigned to the area, and research shows it is lower in productivity. *Id.* Following the example of its peer institutions, FM decided to implement a form of team cleaning. *Id.* While there are various forms of Team Cleaning,³ FM decided upon a system whereby B&G Workers would bid into defined areas, but work as a team, with each assigned a specific task for a certain period of time, with regular rotations. (Berthelsen Testimony.) The team is comprised of four types of specialists concentrating on defined tasks such as light duty and trash, vacuuming, restrooms, and utility work. ⁴ *Id.* The work of each employee is quality checked by all three other specialists as they move through the same area performing their tasks. *Id.* The advantages of Team Cleaning are monumental: less equipment is needed, there is better and more consistent staffing, more flexibility to respond to unique events, added safety because workers are not alone in a building, greater coverage, and greater service because more eyes are on the same spaces. *Id.*

In November of 2010, FM informed the Union that FM was thinking of moving to Team Cleaning. (Berthelsen, Mauren Testimony.) FM also discussed its intent with the LMC in March of 2011, and asked for input. (Durushia Testimony; Employer Ex. 13.) The implementation of Team Cleaning necessitated a rebid of the entire campus, which occurred in June of 2011. (Durushia Testimony; Employer Ex. 19.) The bid process was the same as it had been in 2009, with B&G Workers each bidding into a defined area within a first level supervisor's area. *Id.*

The only difference was instead of the majority of B & G Workers being the only person bidding into a defined area, the defined areas were larger, with multiple B & G Workers bidding into them¹. *Id.*

The Employer further states that the Union filed this grievance shortly thereafter. (Employer Ex. 2.) The grievance was filed at Step 2, initially alleging that the 2011 rebid violated the MOU, and asking that the University follows the MOU and bid defined areas within the first level supervisor's area. (Employer Ex. 2.) At the Step 2 Hearing the Union acknowledged that the University had the right to define the "defined area," but argued that the University violated the MOU and/ or a past practice because the MOU limits those rights to one B&G Worker per area. (Durushia, Talbert Testimony; Employer Ex. 3.) At the Step 3 Hearing, the Union once again acknowledged that the University may define and change the "defined area," and conceded that the University had not violated the MOU, but contended there was a past practice in the application of the MOU that only one person could bid into that defined area. (Durushia, Talbert Testimony; Employer Ex. 4.) In a scramble worthy of Fran Tarkington, the Union now argues at arbitration that the University has in fact violated the MOU, or at least the spirit of it, and has also violated a past practice of not only one person bidding into a defined area, but also being responsible for all custodial tasks in that defined area. (Mauren Testimony.) The evidence presented at the arbitration, however, establishes that neither the language of or spirit of the MOU has been violated, and there is no binding past practice of having only one person bidding into or cleaning a defined area.

III. The Union Position.

The Union states that since 1973, a key component of the represented group is the Building and Grounds ("B&G") Employees in Facilities Management. At the present time, there are approximately 431 employees in B&G. The responsibilities of B&G employees include maintenance of grounds, custodial services and special projects. The University had been divided up into Zones or Districts and the campus is presently divided into the East Bank District, Health Science District and Saint Paul West District.

Since designating Teamsters Local 320 as the exclusive representative in 1973, B&G employees have bid custodial jobs into a specifically defined area

¹ One of which is self-directed cleaning, where groups of B & G Workers are assigned an area and divide up duties and subareas between them, which has been and is used in FM and in the industry. (Durushia, Mapston, Minke, Schmidt, Talbert Testimony.)

⁴¹ A point technician- cleaning, dusting, spot cleaning of surfaces, sinks, doors, whiteboards, glass, etc.; vacuum technician- vacuuming carpets and hard floors, rearranging furniture; restroom technician cleaning, sanitizing and restocking restrooms; and utility technician, cleaning elevators, mopping and vacuuming floors. Employer Ex. 12

based on the established practice of one-person, one-area—an employee would bid into a defined area and was responsible for all of the cleaning within that defined area. Seniority and the posting of the defined area was therefore an integral part of the bidding process, and were memorialized into the CBA in 2001 through the B&G MOU. Union Ex. 2. Accordingly, when the B&G MOU was negotiated, the term “defined area” had acquired a technical definition established through the parties’ past practice and bidding process in place since 1973. The Custodial employee submitted his/her bid on the established practice of one person, one area. In short, they bid for a specific location and performed all of the duties within that location.

The existence of the past practice is supported by the testimony of B&G employees, by the documentation submitted with their testimony, and by exhibits introduced by the University. For instance, the University submitted a Memorandum to Facilities Supervisors dated April 6, 1992, which refers to a specific area and location for bidding on an opening or a vacancy. *See* University Exhibit 14. **The** Memorandum states in part that:

1. When an opening/vacancy occurs the Operations Supervisor will verbally notify employees in her/his area. If an employee in the area is interested the position will be filled on the basis of qualification and Master Seniority.
2. If no one in the immediate area is interested, a Notice of Vacancy identifying the Operations Supervisor and job location will be posted on each zone bulletin board for 5 work days. Interested custodians must then notify the hiring Operations Supervisor in writing by the end of the sixth work day. The position will then be filled on the basis of qualification and master seniority.
3. In the event the position is not filled through steps one or two the position is posted campus wide.

Id. The defined area was also represented in University Exhibit 15, dated August 16, 1993, as a Sample of Internal Bid Posting for B&G workers: Position(s) Available:

Number of Vacancies: 1

Shift/Schedule: 3rd Shift/10:00PM — 6:30AM/Sunday — Thursday

Zone: 3 — Health Sciences **th**

Location: Unit F 8th & 9 Floors

Supervisor: Gregg Olson.

(emphasis added).

By letter dated June 19, 2001, Assistant Director of Employee Relations Joe Kelly advised the Union that the University was ending the past practice associated with Custodial Bidding in Facilities Management:

The purpose of this letter is to put the Union, Teamsters Local 320, on notice that the University is ending the past practices associated with custodial bidding in Facilities Management at the University of Minnesota.

With the expiration of the current contract, the University shall no longer recognize or be subject to any practice regarding custodial bidding which is not specifically outlined in the collective bargaining agreement.

Union Exhibit 4 (emphasis added). Subsequent to Mr. Kelly's letter, the University and the Union negotiated the B&G MOU that is the subject of this Arbitration. *See* Union Ex. 2. The B&G MOU specifically memorialized, in the collective bargaining agreement, the past practice of bidding into a defined area of one-person, one area. *See* Union Ex. 2.

The one-person, one-area definition of the term "defined area" is augmented by the fact that there was almost no controversy concerning the application and understanding of the applied terms and conditions of the B&G MOU in the decade following its execution. In fact, an April 18, 2002, letter sent by Union Business Agent Paul Nelson to Steven Spehn, Associate Vice President of Operations and Construction demonstrates the Union's unequivocal objection to any deviation from the one-person, one-area bidding procedure:

It is my understanding that some Zones are still posting positions as "Team Cleaners" a job title that has never been negotiated.

In order that this bid procedure be administered as it was negotiated, I am hereby requesting a breakdown of all Building and Grounds Employees in each Zone and to what area they are bid into. Also, I am requesting a breakdown of the Building and Grounds Employees that are bid as floaters in each Zone. (Union Ex. 6)

Union Ex. 6 (emphasis added). On June 5, 2002, Mr. Nelson reiterated the negotiated **intent** of the B&G bidding procedures:

Teamsters Local 320 bargained in good faith in response to the U of M concerns of the B&G bidding procedures in Facilities Management. Our membership is held responsible by your supervisors to live up to the terms and conditions that have been negotiated between the parties and I would hope that you hold your supervisors to the same standards. (Union Ex. 7)

Union Ex. 7.

During the 2005 labor negotiations, the University attempted to negotiate a change to the language of the B&G MOU. The University dropped its proposal on August 19, 2005, however, and the B&G MOU remained unchanged. *See* Union Ex. 8. The University again raised the B&G bidding issue during contract negotiations in 2007, indicating that "B&G Bidding concerns single most important issue." Union Ex. 9. During negotiations on July 17, 2007 the University questioned the B&G MOU:

B&G Bidding goal to strengthen FMS ability to meet customer needs by increasing flexibility 15% each day need to move employees around mindset and language in MOU hinders this employees bid defined areas- only group to have

this language takes too long to fill vacancies 10 day trial period hindrance
eliminate B&G MOU in exchange for wage proposals.

Union Ex. 9. On August 3, the University again attempted to eliminate the B&G MOU: Cost steps — part of overall package 2 yrs ago cost was 1% raise ATB to 1.25% B&G bidding in FM not an attack in seniority to language equal to other units. Eliminate and MOU agree to T #28 agree to #30 and #31 increase 2 shift to 60, 3rd shift to 75 items off the table if no agreement.

Union Ex. 9. On August 24, the University proposed to "eliminate area bidding ex. bid St. Paul Campus." *Id.*

Each of the University's proposals to eliminate the "defined area" language in the B&G MOU was rejected by the Union. It is critical to the Union that the University offered to increase wages in exchange for modifying the B&G MOU. The notes of Dave Minke, a member of the Union's negotiating committee, that during negotiations, the University proposed to "eliminate defined area language" in the B&G MOU in exchange for wage increases. *Id.* The Union ultimately rejected the University's 2007 attempt to buy out the "defined area" language contained in the B&G MOU. Moreover, the Union even rejected the University's attempt on March 7, 2011, to remove the B&G MOU from the CBA:

Mike B: Role out proposal for "Team Cleaning" concept

Video of No. Carolina U

Us: clear violation of MOU we will grieve, no agreement of any of it!

: We should be negotiating this as part of the contract. Why would we agree to this c/o negotiation?

: Trying to save jobs

Me: then bring it to negotiations and we can discuss this as part of whole for instance. Why would we agree to this as a job saving measure do guarantee of jobs? Show us the money. Union Ex. 15.

When the B&G MOU was negotiated and entered into in 2001, the term "defined area" meant that one person did all of the cleaning in the specific area (zone) that they bid into. The University's unilateral implementation of team cleaning in August 2011 changed the defined area that employees bid by altering the area geographically and also with respect to the duties that the employees had historically protected through the collective bargaining and seniority process.

The language of the B&G MOU, with the understanding of bidding a defined area and tasks in that area continued as an integral component of the B&G MOU, which was affirmed through the 2009 rebid process set out in University Exhibit 19 and Union Exhibits 10, 11, 12, 13, and 14. These documents were prepared by the University and support the intent of the B&G MOU that employees bid into a defined area and performed the tasks within that area.

Union Ex. 15 reflects a meeting on March 7, 2011 in which the University presented the concept of Team Cleaning and demonstrates that the Union, as it had in all prior instances, objected to the change in bidding as a clear violation of the B&G MOU. As a result of the University's unilateral implementation of team cleaning in August 2011, the terms and conditions of employment established by the CBA were changed.

The University's implementation of team cleaning resulted in a grievance filed by the Union as reflected in Union Ex. 3.

IV. RELEVANT CONTRACT PROVISIONS

MEMORANDUM OF UNDERSTANDING B&G BIDDING IN FACILITIES MANAGEMENT

Employees shall bid defined areas within the First Level Supervisors Area.

In addition to the Area Bid, each Zone may have up to twenty percent (20%) of the total crew bid as floaters. Floater positions ' will be utilized as replacements for absenteeism, vacation, sick leave, compensatory time, etc. Floaters will also be used for Projects and Relief.

Once all floaters are assigned to an area for the shift, if additional vacancies exist, employees that bid into a defined area may be used to supplement the work force in the zone.

After the First Level Supervisors' Area bids are in place, current contract language shall apply.

Article 1: Purpose of Agreement

This AGREEMENT is entered into as of the 1st day of September, 2009, between the Regents of the University of Minnesota, hereinafter called the "employer," and the Minnesota Teamsters Public and Law Enforcement Employees Union, Local No. 320, hereinafter called the "union." It is the intent and purpose of this agreement to:

1.1 Assure sound and mutually beneficial working and economic relationship between the parties hereto;

1.2 Establish procedures for the resolution of disputes concerning agreement's interpretation and/or application; and

1.3 Place in written form the parties' complete agreement upon terms and conditions of employment for the duration of this agreement.

The employer and the union through this agreement shall continue their dedication to the highest quality of public service to the University of Minnesota. Both parties recognize this agreement as a pledge of this dedication.

The parties further recognize that this agreement is not intended to modify any of the discretionary authority vested in the Regents of the University of Minnesota by Statutes of the State of Minnesota.

The parties agree that this contract shall supersede the University of Minnesota Civil Service Rules.

Article 5.1: Employer Authority

The employer retains the sole right to operate and manage all personnel, facilities, equipment, and operating supplies; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this agreement.

Any term and condition of employment not specifically established or modified by this agreement shall remain solely within the discretion of the employer to modify, establish, or eliminate.

Article 8.4 Step 4: Procedure

A grievance unresolved at Step 3 and appealed to Step 4 by the union shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971 as amended. The selection of an arbitrator shall be made in accordance with the "Rules Governing the Arbitration of Grievances."

Article 8.5(A): Arbitrator's Authority

The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the employer and the union, and shall have no authority to make a decision on any other issue not so submitted.

V. STATEMENT OF ISSUE AS DETERMINED BY THE ARBITRATOR

Whether the University violated the MOU and/or a binding past practice by having more than one B&G Worker bid into or clean a defined area.

VI. Arguments of Union:

Since 1973, the University and the Union had accepted the bidding process of employees bidding into a defined area with the responsibility of doing all tasks within that area. This process, which was negotiated and memorialized in the B&G MOU first negotiated in 2001, assured that workloads and schedules were divided equally and fairly. It also assured uniform standards of measurement, coupled with equal procedures and training for all employees. During contract negotiations in 2005 and 2007, the University unsuccessfully attempted to negotiate a removal and/or change to the terms of the B&G MOU. In late

summer 2011, however, the University ignored the bargaining process and implemented "team cleaning," which involved one person doing a specific task in a larger, defined area. This also included individuals repeating one specific task such as: *Point Technician*: first person in the space, responsible for trash removal, dusting, and spot cleaning of walls and windows in all areas but restrooms. *Vacuum Technician*: second person in who follows with the back pack and vacuums all floor surfaces, both carpeted and hard surfaces, as well as high vents and cobwebs. *Restroom Technician*: cleans all restrooms in the designated areas. *Utility Technician*: final person in the space does a little bit of everything, such as lamp changing, cleaning stairwells, mopping hard surface floors that are not in restrooms, cleaning entries, riding routes, or anything else as necessary.

After its failed negotiation attempts in 2005 and 2007, the University unilaterally changed the terms and conditions of the B&G MOU in 2011 by redefining the term "defined area." This violates the CBA and the entire collective bargaining process because the University is attempting to obtain through arbitration what it could not achieve through the collective bargaining process. The University unilateral team cleaning violates the sanctity of the collective bargaining process.

Ms. Mauren testified that the practice since 1973 has been that an employee bid into a defined area with that one person doing all of the cleaning in that area. She testified that this practice was not challenged until Mr. Joe Kelly's letter dated June 19, 2001 advising the Union that the University sought to end the past practice associated with custodial bidding. The University did not present Mr. Kelly at the hearing to testify regarding the past practice associated with custodial bidding. The Union, however, presented testimony from Ms. Mauren as well as David Minke, a University employee prior to 1973, and Joe Warhol, a member of the Union's negotiating committee, who all testified that the result of negotiations in 2001 was the B&G MOU which detailed the bidding process this negotiated B&G MOU is still in effect today.

The Union argues that prior to the MOU and until the change to "team cleaning." there was no question as to the custom and past practice involving the bidding procedures and its result to a defined area. This proof of custom and past practice is based on the evidence and it provides the basis of rules governing matters included and not included in the written contract. It also offers guidance for the proper interpretation of contract language. The doctrine of past practice and custom supports the clear language of the written contract and expresses the intention of the parties to make their written language consistent with what they regularly do in practice, in the administration of their labor agreement. Elkouri, *How Arbitration Works*, 6th Edition p. 607. The custom and practice has been held enforceable through arbitration as being, in essence, a part of the parties' whole agreement." An arbitrator noted: A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and

mutually acceptable habits of action which have grown up around it over the course of time. Stable and peaceful relations between the parties depend upon the development of a mutually satisfactory superstructure of understanding which gives operation significance and practicality to the purely legal wording of the written contract. Peaceful relations depend, further, upon both parties faithfully living up to their mutual commitments as embodied not only in the actual contract itself but also in the modes of actions which have become an integral part of it.

Coca-Cola Bottling Co., 9 LA197, 198 (Jacobs, 1947). The Union noted that the University attempts to establish that the concept of team cleaning (i.e. one person doing one specific task in numerous areas and buildings had been a standard of operation in the past. As support for this contention, the University mistakenly relies on notes from the Labor Management Committee ("LMC") introduced as University Exhibit 13. The Union argued that the testimony revealed, however, that the Labor Management Committee was merely an advisory committee with no ability to bind either the Union or the University. Moreover, the minutes presented were purely a construct of the University. A careful review of University Exhibit **13** reveals confusion on the part of the University as to the team cleaning concept with no rational definition. For example, notes from April 22, 1997: (Note: Prior to the MOU)

A discussion was held regarding the team cleaning concept. Kevin McCourt explained that the WB Zone is implementing a team cleaning concept. Kevin explained that under the team cleaning concept a team of employees will be assigned a group of buildings to clean and as a team will determine the most efficient way to clean the buildings, under the direction of their Operations Supervisor. Both Kevin and Dana Staehnke had positive experiences to share regarding the results of the work groups in Zone 3 and Zone 2 that are using this concept. Kevin stated that this is "working really well and the employees working as a team is able to get a lot of work done." According to Rick Felber, one of the fears regarding team cleaning among employees is that there will not be a way to hold individual employees accountable if they are not working. Under the current system, performance issues can be easily identified because most employees are responsible for a specific area. Karen Williams requested that Management define for employees what "team cleaning" means. A group of Shift Supervisors have been assigned the task of defining team cleaning. Subsequent LMC notes do not provide or refer to a definition of "team cleaning." This was further supported by the testimony of Union witnesses.

The Union further argues that the LMC minutes from May 6, 2009, supports the past practice that as part of the bidding process areas were specifically designated for review by the employees prior to the all-campus rebid of 2009. *See* University Ex. 13, p. 16-17. Those specific defined areas were reflected in the all-campus rebid of 2009. *See* University Ex. 18. The July 15,

2009 LMC notes serve to clarify the confusion of the University in its case as to the duties of "policers." *See* University Ex. 13, p. 13-14. The bidding for a Policer position was designated in those notes as a defined area with specific duties: "Policers are not considered floaters, employees in Policer assignments are considered to have 'area' assignments." *Id.* At p. 13.

The Union further argues that the University also attempted to establish that management rights authorized the University to assign custodial workers at any time or under the direction of supervisors. Page 14 of University Exhibit 13 specifically clears the misconception in the University's case: "Employees can be reassigned on a temporary basis to get the work done." (emphasis added). With respect to permanent reassignments, it was established that management could not make changes without a great deal of thought and for the employer to be successful in cases of discipline, physical accommodation, and other incidents like sexual harassment were necessary for supporting a change of assignment. *Id.* More importantly, however, the management rights clause in section 5.1 of the CBA only gives the University "inherent managerial function[s] not specifically limited by this agreement." The B&G MOU specifically limits the University's managerial functions related to the bidding process for B&G custodial employees. The management rights clause therefore has no bearing on this matter.

University Exhibit 13, page 7, the March 18, 2010 notes show that there was discussion of bidding issues and when specific areas are posted in an affirmation that the defined area would allow an employee a 10-day trial period. According to the LMC notes of September 23, 2010, the Union and custodial employees were not included in any planning phase of the Pillar Group. University Ex. 13, p. 4. This supports the theory that the University was to begin its initiation of violating the B&G MOU with team cleaning.

Finally, the Union argues that the University claimed that team cleaning was explained to the LMC. The LMC notes reflect that there was some type of discussion, but they do not reflect what was specifically discussed concerning team cleaning. There was no agreement as to the concept or any definition of team cleaning. University Ex. 13, p. 2. Moreover, there was never any such negotiated agreement during contract negotiations.

The Union argues that, in its analysis, University exhibits support the Union's argument that the B&G MOU establishes a specific, defined area as one person bidding into an area with the responsibility of cleaning that area. The practical technicality of this was that seniority throughout the years would establish a right to bid specific areas and the responsibility of cleaning that area.

VII. Arguments of Employer:

The Employer argued that no past practice existed that prohibiting more than one person from bidding into or cleaning a defined area. The Union alleges that the University and the Union have been bidding defined areas for many years. The

"defined area," according to the Union, has always meant the specific designated space that was the responsibility of one B&G Worker to keep clean, and multiple employees have never been permitted to bid into the same defined area.

Unfortunately for the Union, past practice requires not only the lengthy use of the alleged past practice, but some indication that the parties understood and accepted the practice as binding. That is clearly not the case here. If anything, the past practice is just the reverse: both pre and post MOU, the University has always had some form of team cleaning, including having more than one person bid into an area, and more than one person cleaning in that bid area.

The University argued that the burden is on the party asserting past practice to establish that it exists by citing *Elkouri & Elkouri, How Arbitration Works*, (ABA/BNA 6th Ed. 2003.) at 607. The Minnesota Supreme Court held in *Ramsey County v. AFSCME*, 309 N.W.2d 785 (Minn. 1981) that "[p]ast practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality." 709 N.W.2d at 788, n.3 (Citing from *Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961). *Elkouri* stated the elements slightly differently: In the absence of a written agreement, 'past practice,' to be binding must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." *Elkouri*, at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954). The general requirements are much the same however, and the Union has not met its burden of establishing any such past practice exists.

The University successfully used various forms of team cleaning as far back as 1994, with the knowledge and consent of the Union. The discussions set forth in the LMC minutes of March 1997 reveal the existence of a "team cleaner" position, assigned to one building, with job assignments varying "from one cleaning crew to the next depending on how the crews want to split the areas up." *Durushia Testimony; University Ex. 13*, p. 35. April 1997 LMC minutes describe the positive results of team cleaning in FM Zones 2 and 3, and announce the implementation of a team cleaning concept on the West Bank, (WB) where a team will be assigned a group of buildings to clean, with the team deciding the most efficient way to clean the building under the direction of their supervisor. *Id.* at p. 38. One such location was Hasselmo Hall, formerly known as the Basic Sciences and Biomedical Engineering Building, where starting in 1994 or 1995, eight (8) to nine (9) B&G Workers bid into a building, divided up tasks, and did all of the cleaning for the building without a specific area. *Durushia, Mapston, Talbert Testimony*. There were no grievances for

violation of any past practice. *Durushia Testimony*.

If, as the Union claims, the MOU was intended to codify past practice, then this grievance fails, because team cleaning continued even after the MOU. When Sam Talbert arrived in the St Paul Zone in 2003, he encountered the "Hill Gang," a group of

B&G Workers who bid into the same entire building, worked four ten-hour shifts per week, and divided up tasks, which changed from day to day. *Mapston, Talbert Testimony*. A member of the Hill Gang was Union steward and arbitration witness, Joe Warhol, who offered no testimony to refute that this form of team cleaning occurred. *Mapston, Talbert, Warhol Testimony*. As of 2003, the McGuire Translational Research Facility ("TRF") also had the self-directed form of team cleaning. *Durushia, Mapston Testimony*. Bids were posted to and B&G workers bid to the entire TRF building. *Id.* Under the direction of their supervisor, crews decided the areas within the building to clean and their tasks on a day to day basis. *Id.* Union Steward and LMC member Julie Harrington who was present at the arbitration but did not testify, was part of that crew, and went out of her way to tell custodial supervisor Ron Mapston how much she loved it. *Mapston Testimony*. These forms of team cleaning, all of which continued or occurred after the MOU, lasted for several years, with the knowledge of, and absolutely no objection or grievances from, the Union. *Durushia, Mauren, Mapston Testimony*.⁸⁹

Like shifting sand, Union head Sue Mauren contends first that there was no team cleaning, then admits that there was in fact team cleaning in a new building. *Mauren Testimony*. This new building was Hasselmo, which used self-directed team cleaning from the time it opened. *Durushia, Mapston, Talbert Testimony*. Steward Dave Minke also testified that he had heard that team cleaning was being done in the TRF building. *Minke Testimony*.¹⁰ Obviously Minke considered self-directed cleaning to be a form of team cleaning. *Id.* In an attempt to impermissibly straddle this hurdle, Mauren testified that there was no self-directed cleaning in these buildings, because her members told her they bid into an area, and the supervisor permitted them to do as they wanted.

⁸As further evidence of the Union's acquiescence to team cleaning, the University offered the example of the operations in Coffman Union, which also utilized team cleaning. Although not a part of FM, Coffman Union management mistakenly thought the MOU applied to its Union B & G Workers, and had them bid into various areas within. *Durushia Testimony*. Because Coffman was not a part of FM, Coffman ended bidding. *Id.*

⁹ The Union offers a letter to the University objecting to the posting of positions as "team cleaners." *Union Ex. 7*. However, Union steward Minke testified that the basis for their objection was that the supervisor violated the MOU by listing the posting as team cleaning, as opposed to an area bid; a critical distinction that totally undermines their position. *Minke Testimony*.

¹⁰ Like Mauren, Minke at first testified that there was no team cleaning in TRF. *Minke Testimony*

Mauren Testimony. Lack of personal knowledge aside, Mauren claims this was not team cleaning because they "owned that space" and did all of the work. *Id.* Her testimony not only lacks credibility, but is blatantly contradicted by the testimony of her own steward and University witnesses. Mauren defines zone cleaning as when a B&G Worker bids into a discrete assigned area and is responsible for performing all of the custodial tasks in that area. *Id.* Minke also testified that under zone or area cleaning, a defined area is a portion of a building or building cleaned by a single person. *Minke Testimony.*

With the self-directed form of team cleaning, however, those **B&G** Workers did not have a discrete area that they bid into and performed all tasks therein. They bid into a building, and divided up or were assigned areas and tasks on a daily basis. They did not "own" a particular floor or area, and the custodial tasks were performed according to whoever was assigned to do them that particular day.

This is team, not area, cleaning. Moreover, the LMC minutes of April 1997 noted above reflect both FM and the Union considered self-directed cleaning to be a form of team cleaning. *Durushia Testimony; University Ex. 13, p. 38.* Clearly FM has always had some B&G Workers cleaning in teams. The only difference in the new system is that each B&G Worker performs a specified task as opposed to the open system used before.

The Employer further argues that there is a past practice of more than one person bidding into a defined area. Evidence presented at the arbitration shows that in 2002, just one year after the MOU, there were B&G Workers bidding into and cleaning the same defined areas. *Durushia Testimony, University Ex. 26.* Prior to the MOU, most, but not all, B&G Workers bid into defined areas. *Durushia Testimony, University Exs. 14, 15.* A 2002 staffing sheet reflects that two B&G Workers were assigned to clean the second floor of the Mayo building, and two B&G Workers were assigned to clean the first and third floor corridors of the Mayo building. *Id.* Two B&G Workers were also assigned to clean the second and third floors of the MCB building, and three B&G Workers were assigned to clean the 142 building. *Id.* This practice of dual bids continued even through the 2009 rebid.

The employer further argues that the Union repeatedly confirmed that the 2009 rebid complied with both the MOU and past practice. *Mauren, Minke, Warhol Testimony.* Mauren even said it would be a good template for future rebids. *Mauren Testimony.* The 2009 rebid however, substantiates that subsequent to the MOU, there were dual bids, with B&G Workers bidding into and cleaning the same defined areas. The 2009 Bid Sheets list a bid number, each defined area or building by number, along with a description of the area, as well as the hours and

days of the bid. *Durushia Testimony; University Ex. 18*. In the St. Paul District, there were two bids, each for building 427, third floor, Monday through Friday, 3:30 pm to 12:00 am. *University Ex. 18, p. 3*. In the Northwest District, there were two bids each for building 173, the entire Child Care Center, Sunday through Thursday, 9:30 pm to 6:00 am, and building 169, Recreation Center public areas, Sunday through Thursday, 9:30 pm to 6:00 am. *Id. at p. 6*. The East Bank District had dual bids as well. There were two bids each for building 46, Morrill Hall, Monday through Friday, 3:30 pm to 12:00 am, and building 422; Folwell Hall, Monday through Friday, 3:30 pm to 12:00 am. *Id. at p. 20*.

Perhaps most damaging to the Union's case is the evidence and testimony of Jeff Schmidt, the Senior Building and Grounds Supervisor, who supervises the Aquatic Center. As Schmidt testified, upon his arrival at the University in 1992, the Aquatic Center was being cleaned with a team cleaning type assignment. *Schmidt Testimony*. There was just one area, bid as the Aquatic Center, with two B & G Workers bidding into that area. *Id.* Vacancies in that area were even posted as "this area is a team assignment." *Id.* This team cleaning continued throughout Schmidt's tenure, and is confirmed on the 2009 Bid Sheet. *Schmidt Testimony, University Ex. 18, p. 6*. Page six of the 2009 Bid Sheets lists building 167, University Aquatic Center, Sunday through Thursday, 9:30 pm to 6:00 am. *Id.* As Schmidt testified, the area was not divided, there were no defined tasks, the work was assigned according to whatever was needed that day, and the two often worked side by side. *Schmidt Testimony*. There were no objections or grievances from the Union. *Durushia, Schmidt Testimony*.

The Union claims that it was unaware of any dual bids, and if there were separate bids into the same area, that would be a violation of the MOU and past practice. Mauren, Minke Testimony. However, the University did so in 2009, with the blessing of the Union. It is undisputed that the Union reviewed and approved the 2009 bids. They were reviewed by the LMC at its May 6, 2009 meeting, at which Mauren, Minke and Warhol were all present. *Durushia Testimony, University Ex. 13 at p. 16*. In addition, Union stewards Minke and Warhol, who are responsible for policing the contract, both said they saw the 2009 bid sheets when they themselves went to bid. *Minke, Warhol Testimony*.

The only difference between the 2009 and 2011 rebids is that in 2009, the identical bids were listed individually, and in 2011 and they were listed together. The bids were identical, and therefore the B & G Workers did in fact bid into and clean the same defined area. The dual bids also establish that the B & G Workers who bid into those dual bids shared the custodial tasks in those defined areas. Of critical import, the Union has conceded that this practice was consistent with both the MOU and past practice. This is fatal to the Union's entire case.

The Employer argues that there is a past practice of more than one B&G worker cleaning in a defined area. The Union alleges that the 2011 rebid differs from the 2009 rebid because one person is no longer responsible for all of the duties in the first level supervisor's area. *Warhol Testimony*. This is blatantly contradicted by not only the evidence of team cleaning and dual bids above, but the daily assignments of B&G Workers, Area Policers, overlapping bids, Trash Runners, and Route Rider floor crews. The Employer argues that there is no past practice as to the type of work that can be performed by B&G Workers.

Reduced to its essence, the Union's objection to the current team cleaning structure is that B&G Workers are assigned to perform only a subset of custodial tasks.¹¹ The Union concedes that FM has the right to change the tasks of its B&G Workers, and further that there is no past practice regarding the type of work that can be assigned. *Mauren, Minke, Warhol Testimony*. In fact, Mauren goes so far as to testify that the Union would not grieve if a B & G Worker was told to perform only one task. *Mauren Testimony*.

That is exactly what is occurring; FM has simply divided up and the tasks that its B&G Workers perform and assigned them to individual workers.

FM has always reassigned B&G Workers to perform tasks in the same defined area. Union protestations to the contrary, there is an established practice that despite bid areas, B&G Workers may be assigned during their shift to cover or clean other areas. *Durushia, Minke, Warhol Testimony*. In the LMC minutes of September 2009, the Union acknowledged that FM may reassign employees, either temporarily or permanently, to bid areas of other B & G Workers, whether to cover absences or other needs. *Durushia Testimony, Ex. 13, p. 10*.¹² This practice, unrefuted by the Union, was not limited to absences, but was used for other needs as well. FM has unilaterally changed the defined work area of B & G Workers when buildings go offline, for large projects or for other needs, resulting in their working in the same defined areas as other B & G Workers. *Durushia, McArdle Testimony*. The propriety of this practice was validated by Arbitrators Thomas Gallagher and Richard John Miller who recognized FM's right to make reassignments of B&G Workers after bidding, even if involuntary.¹³ This decision establishes that FM can assign a second B & G Worker to a bid area if desired, even to perform the same tasks. In fact, the Union acknowledged that B & G Workers can be reassigned to help others out, either as directed by a supervisor or voluntarily, and neither the MOU nor past practice prohibit it. *Minke, Warhol Testimony*.

Area Policers, Trash Runners, Route Riders and overlapping bids substantiate that more than one B & G Worker performs duties in a defined area.

11 A point technician- cleaning, dusting, spot cleaning of surfaces, sinks, doors, whiteboards, glass, etc.; vacuum technician- vacuuming carpets and hard floors, rearranging furniture; restroom technician cleaning, sanitizing and restocking restrooms; and utility technician, cleaning elevators, mopping and vacuuming floors. *University Ex. 12.*

12 A grievance filed by the Union around the same time alleged that University could not reassign **until after all floaters had been assigned.** *Durushia Testimony; University Ex. 21.* The Step Three decision, which was not appealed to arbitration, held that FM had for many years reassigned B & G Workers to cover for absent employees. *Id.*

According to the Union, only one B & G Worker performs the custodial tasks in a defined area. This assumes that each defined area is separate and distinct, with no other B & G Worker performing tasks in that area. This premise is flawed and ignores the numerous positions and area bids that overlap, resulting in more than one B & G Worker cleaning in an area.

(a) Area Policers.

Area Policers are defined area bids that encompass and overlap multiple buildings, bids, and shifts. *Durushia, Mapston, Talbert Testimony; University Ex. 24.* They have been in existence over twenty (20) years, and are separate and distinct from floaters. *Durushia, Mapston, Talbert Testimony; University Ex. 18.* As reflected in the 2009 rebid, Area Policers perform the same tasks during overlapping shifts of other B&G Workers that bid into defined areas: ¹⁴ Policer bid NW-104 covers Mondale, Wilson, MLAC, Blegen, Heller, and Willey, and works during the same time and in the same bid areas as NW bids 25-29, 20-23, 30-35, 41-42, and 36-38. *University Ex. 18, pp. 8, 9, 22.* Policer bid NW-104 covers Carlson (CSOM), Humphrey (HHH), Ted Mann, Ferguson, and Rang, and works during the same time and in the same bid areas as NW bids 10-15, 43-44, and 5-9. *Id.*

Policer bid NW-106, covers all of the Northwest District, as needed, and therefore works during the same time and in the same bid areas as all of bids in that District. *Id.*

Policer bids NW-108 and 109 cover Carlson and Hanson, and work during the same time and in the same bid areas as NW bids 10-19. *Id. at pp. 8, 22.*

Policer Bid HS-107 covers Mayo, Moos, Diehl, and Children's Cancer Research, and works during the same time and in the same bid areas as HS-51, 97-100, 89-92, and 40-41. *Id. at pp. 12, 14, 15.*

Policer bid HS-114, covers all of the Health Sciences District, as needed, and therefore works during the same time and in the same bid areas as all of bids in that District. *Id. at p. 15.*

(b) Trash runners.

Trash runners are responsible for picking up and emptying trash containers filled by other B & G Workers and taking them down to the designated dumpster. *Durushia, Mapston Testimony.* Originally B & G Workers did not bid on this assignment, and they were just assigned during the shift. *Id.* By the time of the 2009 rebid, they were actually defined areas, performing a custodial task that

had one time been performed by one B & G Worker in his or her defined area. *Id.* As shown in the 2009 Bid Sheets, Trash Runners were responsible for all of the trash picked up by the B & G Workers in their respective defined areas. Trash Runner bid HS-38 in Weaver-Densford covered all of the trash in bid areas HS-34-38. *University Ex. 18, p. 11.* Similarly, Trash Runner bid HS-67 in Mayo covered all of the trash in bid areas HS-63-69. *Id. at p. 12.* Yet another example of a B & G Worker performing a specific task that had previously been done by a B & G Worker in a defined area.

© Route Riders/Floor Crews.

Route Riders, or floor crews as they are sometimes known, are defined area bids that encompass and overlap multiple buildings and bids. *Durushia, Mapston, McArdle Testimony.* Route Riders are responsible for the floor-sweeping, burnishing, and auto scrubbing of floors of multiple buildings. *Durushia, Mapston, McArdle Testimony; University Ex. 24, pp. 23-25, 58-58, 76, Ex. 28.* Senior B & G Supervisor Tom McArdle testified as to the evolution of this position, saying it originated after his arrival, when an auto scrubber was purchased and a B & G Worker was given a route that covered several buildings. *McArdle Testimony.* By the 2009 rebid, more autoscrubbers had been purchased and it had become a defined bid area. *Id.* As reflected in the 2009 rebid, Route Riders perform the floor cleaning tasks during shifts of other B & G Workers that bid into defined areas:

Route Rider bid EB-42 cleans the floors in Kolthoff, Smith, Walter and Johnston, in the same defined bid areas as EB-31-37, 45-47, 38-40. *University Ex. 18, p. 18.*

Route Rider bid NW-45 cleans the floors in Mondale and Willey, in the same defined bid areas as NW-25-29 and 36-38. *Id. at p. 9.*

Route Rider bid NW-46 cleans the floors in Social Sciences, Heller, Blegen, and Humphrey, in the same defined bid areas as NW-32-35, and 39-44. *Id.*

Route Rider bid NW-47 cleans the floors in Wilson, in the same defined bid areas as NW-20-23. *Id. at p. 8.*

Route Rider bid NW-48 cleans the floors in Carlson and Hanson, in the same defined bid areas as NW-10-19. *Id.*

Instead of B & G Workers, the Route Riders perform all of the floor cleaning tasks in their respective buildings, once again proving the myth of one B & G Worker performing all of the custodial duties in a defined area.

(d) Overlapping bids

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Finally, the 2009 Bid Sheets show that contrary to having only one B & G Worker performing tasks in an area, the following are bids in which particular areas, and therefore custodial tasks, overlap one another in terms of location, shifts, and duties:

- HS bids 109 and 110. *University Ex. 18, p. 15.*
- HS bids 86-88. *Id. at p. 14.*
- HS bids 28 and 33. *Id. at p. 11.*
- HS bids 50-52. *Id. at p. 12.*
- HS bids 54 and 55. *Id.*
- EB bid 14 and 16. *Id. at p. 17.*
- EB bids 73-75. *Id. at p. 20.*
- EB bids 76-77. *Id.*
- EB bids 78-79. *Id.*
- EB bids 63, 64 and 66. *Id.*
- EB bids 67-70. *Id.*
- NW bids 107-109. *Id. at p. 22.*

These overlapping bids, as well as the dual bids, Area Policers, Trash Runners, and Route Riders, show that FM has always had more than one person performing custodial tasks in a defined bid area, and prior to the 2001 rebid, there have been no grievances by the Union. *Durushia, Mapston, McArdle Testimony.*

The continued failure of one party to object to the other's party's interpretation of a past practice can be held to constitute acceptance of such interpretation so as to make it mutual. *Elkouri, at 624.* Here, FM has continually interpreted the MOU and operated under the assumption that more than one G Worker may bid into and clean a defined area without objection by the Union. Even if there is no binding past practice of more than one B & G Worker in a defined area, the FM's actions conclusively establish that there has been no longevity, consistency, or more importantly, mutuality, regarding any past practice to the contrary.¹⁵

The Right To Determine Staffing Is Specifically Reserved By The Management Rights Clause Of The Contract And Pelra.

Pursuant to the management rights clause of the contract and PELRA, the University has the right to staff our defined areas as we see fit. The contract provides as follows:

The employer retains the sole right to operate and manage all personnel, facilities, equipment, and operating supplies; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this agreement.

Any term and condition of employment not specifically established or modified by this agreement shall remain solely within the discretion of the employer to modify, establish, or eliminate.

University Ex. 1. The changes made by FM are specifically aligned with the rights identified in this provision, none of which have ever been given up by the University in the MOU. The MOU limits only FM's right to assign B & G Workers to particular work locations, requiring that they have an opportunity to bid into them. *Id.* The University retains the right to define the work areas, and may do so in any fashion it wishes. *Mauren, Minke, Swenson, Warhol Testimony; University Exs. 3, 4.*

Similarly, PELRA recognizes the inherent managerial right to run one's operations:

179A.07 RIGHTS AND OBLIGATIONS OF EMPLOYERS.

Subdivision 1. Inherent managerial policy.

A public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to . . . utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel. ...

¹⁵ The decision in *Teamsters Local 320 v. University of Minnesota*, BMS Case No 97-PA-1023 (*Parking Decision*) is distinguishable from this matter. In that arbitration, the Union claimed that a long-standing practice of bidding to specific facilities or ramps by senior parking attendants could not be unilaterally changed to rotate them among different locations by the University. *Id.* at p. 6. The facts in this case are quite different. In the *Parking Decision* the employees had already bid into particular shift families of two to six facility locations; the grievance arose when the University began to rotate them among facilities on a

monthly basis. *Id. at p. 5*. There was no contract language in the Parking Decision, whereas here we have an MOU, FM is following the clear language of the MOU and bidding to defined areas, thus there is no need to look to past practice. While the MOU requires bidding into a defined area, it does not provide any direction or restrictions regarding how those areas are defined or how many can bid into them, and the University has consistently interpreted and operationalized the MOU in that manner without objection from the Union. In the instant case there is no such change, as the bid is still to a defined area, and tasks therein rotated within that same defined area -- it is just that the area itself is larger.

Limiting the University's ability to change how many B&G Workers bid into a defined area or the tasks they perform also runs afoul of PELRA which gives the University the right to determine the number of employees, manage its budget, and use technology.

The Employer argues that the bidding into and cleaning by more than one person into a defined area is an exercise of managerial discretion and cannot provide the basis for a binding past practice. In essence, what the Union attempts to do is to take a past operational preference by FM not to have team cleaning in all of its areas, and turn it into a binding past practice. Past practice has not operated to prevent management from determining the number of workers needed on a job. *Elkouri at pp. 614-615, frt 35; LELS v. Washington County, BMS Case No. 09-PA-0027*.¹⁶ Just because the University negotiated the MOU does not mean it waived its inherent managerial right to determine the staffing in its defined areas. Indeed, arbitrators hesitate to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management, and with good reason. Such hesitance was evidenced by Arbitrator Whitely McCoy:

"But caution must be exercised in reading into contracts implied terms, lest arbitrators start remaking the contracts which the parties themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. ... Mere non-use of a right does not entail a loss of it."

Elkouri, p. 612. Further, *Elkouri* cites the admonition of Arbitrator Harry Shulman as "one of the most cogent statements published regarding the binding force of custom and past practice" as follows:

"But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is methods that developed without design or deliberation. Or they may be choices that developed by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion. . . ."

Elkouri, at p. 613.

In negotiating the MOU, the University did not surrender its inherent managerial right to staff its defined bid areas or create more than one bid per defined area. This was merely an exercise in managerial discretion, based upon the management rights clause and the University's right to staff and direct its workforce. The mere persistence of some single bids does not create an obligation to continue it, because the University has never indicated, either in writing or by conduct, that it has accepted that method of operation as one that may not be changed. In fact, as demonstrated above, it has continually deviated from it. Mere nonuse of a management right does not entail a loss of it. The decision to have only one B & G Worker bid into the majority of defined areas and perform all or a majority of custodial tasks in that area is merely a change in discretionary policy, alterable at the discretion of FM; it is not based on something that binds the University to a certain result. FM's decision not to exercise that right until now does not mean that the University has surrendered that right or is now precluded from exercising the same.

The Employer argues further that the conditions upon which the alleged past practice was based have changed, and it should no longer be given effect.

Assuming, solely for the sake of argument, that a past practice does exist, it may be modified or eliminated where the underlying basis for the practice has changed. ". . . absent language in a contract expressly or impliedly to the contrary, once the conditions upon which the past practice are based are changed or eliminated, the practice may no longer be given effect." *Elkouri* at p. 618, fn 67; See also, *Independent School District 197*, 97 LA 364, 367 (Fogelberg, 1991) ("Arbitral theory holds that a past practice is legitimized by the underlying conditions on which it is based. Once these conditions change, the practice is not necessarily binding any longer."); *City of Alliance, Ohio*, 98 603, 605 (*Hewitt*, 1992) ("When conditions upon which the practice was established have changed, the practice may be modified provided it is for legitimate business reasons."). FM's current budget situation is exactly the type of problem contemplated.

The MOU requires employees to bid into defined areas; it does not address how many can bid. *University Ex. 1*. In testimony unrefuted by the Union, the University laid out the fiscal and operational challenges FM has faced during the past few years. *Berthelsen Testimony*. Confronted with a \$3.1 million custodial budget cut, a twenty percent (20%) decrease in the size of FM over the next four (4) years, the physical space for which it was responsible increasing by thirteen percent (13%) over the last decade, and the Union complaining in LMC meetings that defined areas are too large and staffing levels need to be adjusted, something had to be done. As discussed above, subcontracting or increasing defined area size were not viable options. *Berthelsen Testimony*. FM needed to be able to change its

staffing model to get all of its work done. *Id.* There was no assertion or evidence by the Union that FM could accomplish this any other way.¹⁷ The landscape on which FM conducted its operations has shifted dramatically, calling into question the feasibility of area or zone cleaning. The switch to full team cleaning is a legitimate business reason for modification of any past practice that might exist.

¹⁶ In *LELS*, the union objected to Washington County's use of bailiffs and correctional officers, as opposed to licensed peace officers, for monitoring and security posts. *LELS*, at pp. 1-2. Arbitrator Mario Bognanno held that in the absence of either language in the contract or position descriptions, the fact the parties negotiated language regarding the provision of highest quality police services and how overtime is to be assigned did not mean Washington County waived its inherent managerial right to create different positions and staff them with non-police. *Id.* at p. 17. A copy is attached hereto. •

VIII. Opinion of Arbitrator:

The Arbitrator's award is rationally derived from the interpretation of the Collective Bargaining Agreement (CBA) and the Memorandum of Understanding (MOU) in light of their language, their context and other indicia of the parties' intent, including past practice.

The issue in this case is whether the University violated the MOU and/or a binding past practice by having more than one B&G Worker bid into or clean a defined area.

The MOU contains no language regarding the number of B&G Workers that can bid into a defined area or the tasks may indicates a desire not to impose such a limitation on one hand, and Union claims there is a limitation based on the established past practice of one person, one-area on the other hand, thus requiring a review of the parties' past practice to determine the intent of the parties. The determination of whether the intent of parties was to having one or more workers bidding into a defined area is crucial to deciding this case on the merits. Based on the above reasoning, the arbitrator finds that the language contained in the MOU, regarding the number of workers bidding into a defined area, is unclear and ambiguous.

In 2001, prior to negotiation of the MOU, the Union was put on clear notice that the University was ending the past practices associated with custodial bidding in FM at the University and that with the expiration of the current contract, the University shall no longer recognize or be subject to any practice regarding custodial bidding which is not specifically outlined in the CBA.

Faced with increasing space to maintain on one hand, and a shrinking budget on the other, the University of Minnesota's ("University") Facilities Management department ("FM") was forced to rethink how it conducts the University's custodial operations. After exhaustive evaluation of its needs and services, as well as research into industry trends and operations of peer institutions, FM decided on a form of team cleaning. Although the University had utilized team cleaning in various forms

in the past without objection from Teamsters Local 320 ("the Union") which represents FM's Building and Grounds Workers ("B&G Worker"), the majority of its work was performed via zone cleaning, in which a B&G Worker would bid into a defined area, and be responsible for all services in that area. With team cleaning in contrast, B&G Workers still bid into defined areas, but work as a team, with each assigned a specific task for a certain period of time, with regular rotations.

In an effort to thwart the change to team cleaning, the Union filed this grievance, alleging that the team cleaning concept was rejected by the Union when the parties entered into a Memorandum of Understanding (the "MOU") in 2001 that provides that B&G Workers will bid into defined areas within the first level supervisor's area.

According to the Union, a "defined area" has always meant the specific designated space that was the responsibility of one B&G Worker to keep clean, and has never permitted multiple employees to bid the same area, as is the case with the team cleaning approach.

The evidence presented at the arbitration, however, establishes that neither the language nor spirit of the MOU has been violated. The University continues to have B&G Workers bid into a defined area; and the MOU contains no language regarding the number of B&G Workers that can bid into a defined area or the tasks they can perform. The Union has conceded that the MOU has not been violated. Moreover, the MOU was not intended to apply to rebids.

The University also conclusively established that there is no binding past practice of having only one person bidding into or cleaning a defined area. There is actually a past practice of team cleaning, both before and after the MOU, and there is a past practice of more than one B&G Worker bidding into a defined area; and more than one B&G Worker cleaning in a defined area. In addition, the right to determine staffing is specifically reserved by the management rights clause of the contract and PELRA, and the bidding into and cleaning by more than one person into a defined area is an exercise of managerial discretion and cannot provide the basis for a binding past practice. Finally, the conditions upon which the alleged past practice was based have changed, and also, any binding past practice was clearly repudiated by the University giving timely and proper notification of intent to do so in 2001 before negotiations of the MOU. Any prior past practice limiting the number of FM B&G Workers bidding into or cleaning a defined area shall no longer be given effect.

IX. THE AWARD

The Arbitrator finds, based upon clear and convincing evidence that the University did not violate the MOU or a binding past practice by having more than one B&G

Worker bid into a defined area, and therefore the Grievance is Denied in its entirety.

Issued and ordered on this 9th day of
June, 2012 from Savage, Minnesota.

Harry S. Crump
Hon. Harry S. Crump, Labor Arbitrator